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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 MALEEK JAMES,

14 Defendant.

CASE NO. CR09-427-MJP

ORDER DENYING DEFENDANT'S
MOTIONS FOR DISCOVERY AND
FOR NEW TRIAL

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16 THIS MATTER comes before the Court on Defendant's Motion for Discovery of Related
17 Case, (Dkt. No. 426), and Defendant's Motion for New Trial, (Dkt. No. 427). Having reviewed
18 the Motions, the Government's response, (Dkt. No. 429), Defendant's reply, (Dkt. No. 433), and
19 the related record, the Court hereby DENIES the Motions.

20 **Background**

21 On February 18, 2011, Defendant was convicted of: (1) Conspiracy to Possess
22 MDMA/ecstasy with the Intent to Distribute; (2) Aiding and Abetting the Possession of
23 MDMA/ecstasy with Intent to Distribute; (3) Conspiracy to Import MDMA/ecstasy; and (4)
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1 Aiding and Abetting the Importation of MDMA/ecstasy. (Dkt. No. 275.) Defendant was
2 sentenced to 108 months in custody. (Dkt. No. 354.)

3 Defendant appealed his conviction and sentence, which was affirmed by the Ninth
4 Circuit. (Dkt. No. 384.) Defendant then filed several post-conviction motions, including a
5 motion to vacate his conviction and sentence under 18 U.S.C. § 2255. (Dkt. No. 396.) The
6 Court denied Defendant's 2255 Motion, and the Ninth Circuit affirmed the Court's ruling. See
7 James v. United States, Case No. 2:12-cv-1917-MJP, Dkt. Nos. 97, 107 (W.D. Wash. 2012).

8 Defendant has filed a Motion for New Trial, (Dkt. No. 427), and a Motion for Discovery
9 of Related Case, (Dkt. No. 426), in this criminal case. The Government opposes both Motions,
10 (Dkt. No. 429). For reasons stated below, the Court DENIES Defendant's Motions.

11 Discussion

12 **I. Motion for Discovery**

13 In his Motion for Discovery of Related Case, (Dkt. No. 426), Defendant requests copies
14 of the proffers, pleas, and pre-arrest statements from certain co-defendants in the related criminal
15 case United States v. Mahli, Case No. 2:09-cr-00429-RSL (W.D. Wash. 2009). Defendant
16 argues he should be permitted to inspect these documents because they might contain
17 information that would have been beneficial to his defense. (Id. at 1.) The Government opposes
18 Defendant's Motion for Discovery on the grounds that the Motion is both untimely and factually
19 deficient. (Dkt. No. 429 at 3–5.)

20 The Court concludes Defendant's Motion for Discovery of Related Case is untimely.
21 Fed. R. Crim. P. 12(b)(3) provides that certain types of motions, including discovery motions,
22 must be raised before trial if the basis for the motion is reasonably available and the motion can
23 be determined without a trial on the merits. Here, Defendant provides no proper reason why he
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1 could not and did not make his motion before trial. (Dkt. No. 426.) While Defendant contends
2 he only recently learned of the co-defendants he is seeking discovery for, the record before the
3 Court shows the Government provided Defendant with discovery from the Mahli case which
4 identified that case as related to Defendant's case. (Dkt. No. 429-1 at 2.)

5 Because Defendant fails to provide a proper reason why he could not and did not bring
6 his Motion before trial, the Court DENIES Defendant's Motion for Discovery of Related Case as
7 untimely. (Dkt. No. 426.) The Court does not reach the Government's arguments regarding the
8 factual sufficiency of Defendant's Motion.

9 II. Motion for New Trial

10 Defendant has also filed a Motion for New Trial based upon a claim of newly discovered
11 evidence under Fed. R. Crim. P. 33. (Dkt. No. 427.) In this Motion, Defendant argues: (1) that
12 the Government failed to provide discovery pertaining to co-defendants in the related Mahli
13 case; and (2) that his co-defendant Kim Farah refused to assist in his defense due to Government
14 coercion. (Id.) The Government argues both that Defendant does not meet his burden under
15 Rule 33 to invalidate his criminal conviction, and that Defendant's Motion for New Trial is
16 untimely. (Dkt. No. 429 at 5–11.)

17 The Court concludes Defendant fails to meet his burden under Rule 33. To prevail on a
18 Rule 33 motion for new trial based upon newly discovered evidence, a defendant must show the
19 following: “ (1) the evidence must be newly discovered; (2) the failure to discover the evidence
20 sooner must not be the result of lack of diligence on the defendant's part; (3) the evidence must
21 be material to the issues at trial; (4) the evidence must be neither cumulative nor merely
22 impeaching; and (5) the evidence must indicate that a new trial would probably result in
23 acquittal.” United States v. Kulczyk, 931 F.2d 542, 548 (9th Cir. 1991). Defendant fails to meet
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1 both the first and second prongs of the Kulczyk test. As discussed in greater detail above,
2 Defendant was provided with discovery from the Mahli case which indentified that case as
3 related to Defendant's case. Therefore, Defendant's contention that the existence of the related
4 case, and of the co-defendants, is "newly discovered" evidence is without merit. Nor can
5 Defendant show that the failure to discover the related case was not due to lack of diligence on
6 Defendant's part. Likewise, Defendant fails to show that the information that his co-defendant,
7 Kim Farah, refused to assist in his defense due to Government coercion constitutes "newly
8 discovered" evidence or that any failure to discover this information was not due to lack of
9 diligence on Defendant's part. The Government correctly points out that Defendant was aware
10 of Ms. Farah, who is his sister-in-law and was his co-defendant, at the time of his trial and that
11 nothing prevented Defendant from calling Ms. Farah as a witness at trial to secure her testimony.
12 (Dkt. No. 429 at 8.) Further, Defendant made a similar argument regarding Ms. Farah in his
13 2255 motion filed in February 2013—over three years ago. See James v. United States, Case
14 No. 2:12-cv-01917-MJP, Dkt. No. 16 at 7 (W.D. Wash. 2012).

15 Further, even if Defendant could meet his burden under Rule 33, Defendant's Motion for
16 New Trial is untimely. Fed. R. Crim. P. 33(b) provides: "(1) Newly Discovered Evidence. Any
17 motion for a new trial grounded on newly discovered evidence must be filed within 3 years after
18 the verdict or finding of guilty." Here, the jury found Defendant guilty on February 18, 2011.
19 (Dkt. No. 275.) Because Defendant filed his Motion for New Trial on May 16, 2016—more than
20 five years later—the Motion is untimely.

21 Because Defendant fails to meet his burden under Rule 33 and because the Motion is
22 untimely, the Court DENIES Defendant's Motion for New Trial based upon a claim of newly
23 discovered evidence, (Dkt. No. 427).

Conclusion

The Court DENIES Defendant's Motion for Discovery, (Dkt. No. 426), and Defendant's Motion for New Trial, (Dkt. No. 427), for reasons stated in this Order. Defendant has filed two additional Motions for New Trial, (Dkt. Nos. 430, 434), which are substantively identical to the Motion addressed in this Order. For reasons stated in this Order, the Court DENIES these motions as well.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 15th day of August, 2016.

A handwritten signature in black ink, appearing to read "Marsha J. Pechman", written over a horizontal line.

Marsha J. Pechman
United States District Judge